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Nos. 81-2147 and 81-2188
(Consolidated)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF ARIZONA, et al.,

Petitioners,

vs.

SAN CARLOS APACHE TRIBE OF ARIZONA, et al.,

Respondents,

STATE OF MONTANA, et al.,

Petitioners,

vs.

NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF JICARILLA APACHE TRIBE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

The Jicarilla Apache Tribe (the Tribe), *amicus curiae* herein, is Intervenor in Cause No. 75-184, San Juan County District Court, New Mexico, entitled *State of New Mexico, ex rel. Reynolds, State Engineer v. United States of America, et al.*, filed March 13, 1975. The Complaint in that action, pending in State Court despite several attempts by both the Tribe and the United States to obtain removal to federal district court and/or dismissal, expressly seeks an adjudication solely of the federally-reserved water rights on the San Juan Stream System in New Mexico.

The Tribe was Plaintiff in *Jicarilla Apache Tribe v. United States, et al.*, filed December 12, 1975, wherein it invoked the jurisdiction of the Federal District Court for New Mexico, pursuant to 28 U.S.C. §1362, seeking an adjudication of its rights on the Navajo River System, a tributary of the San Juan River Stream System and the only perennial stream on the Jicarilla Reservation. In the last-mentioned action the Tribe sought to enjoin the diversion of water from the Navajo River System through the San Juan-Chama Transmountain Diversion Project by the Secretary of Interior, in amounts in excess of those which could be put to beneficial use by the parties who have contracted with the Secretary for such water, in violation of Article II(b)(2) and Article XIX(a) of the Upper Colorado River Basin Compact approved by Congress by Act of April 6, 1949, Chapter 48, 63 Stat. 31.

On July 19, 1977, the Federal District Court for New Mexico entered its Order dismissing the action for lack of jurisdiction, holding that the New Mexico District Court for San Juan County has exclusive jurisdiction to hear the matter, an action having been filed by the State of New Mex-

ico in state court prior to the date of filing of the action by the Tribe.

On appeal from the District Court's Order, the Court of Appeals for the 10th Circuit sustained the dismissal of that portion of the Tribe's action requesting an adjudication of the water rights on the Navajo River System on the ground that the New Mexico court had first obtained jurisdiction, pre-empting the action filed by the Tribe. *Jicarilla Apache* Tribe v. United States, et al., 601 F.2d 1116 (10th Cir.), cert. *Tribe v. United States, et al.,* 601 F.2d 1116 (10th Cir.), cert. denied, 444 U.S. 995, 100 S. Ct. 530, 62 L.Ed. 2d 426 (1979). Responding to the argument of the Tribe that the disclaimer provisions of the Enabling Act and the New Mexico Constitution were a bar to state court jurisdiction, the Court held that such disclaimers related only to the proprietary interests of the Tribe.

In its Petition for Writ of Certiorari, the Tribe argued issues identical to those now pending before this Court in these consolidated cases. That Petition was denied, thus relegating the adjudication of the Tribe's water rights to the New Mexico Court. The Tribe, *amicus curiae* here, was the Plaintiff in the action dismissed by the United States District Court, District of New Mexico, which was affirmed on appeal by the Court of Appeals for the 10th Circuit. The decision of the 10th Circuit Court is in conflict as to several issues with the decision of the Court of Appeals for the 9th Circuit on certiorari before this Court in the instant case. It is respectfully submitted that because of the interests of the Jicarilla Apache Tribe in this case stated above, the Court should permit the filing of this Amicus Brief.

ARGUMENT

On March 13, 1975, the State of New Mexico, by and through its State Engineer, filed a Complaint in the District Court for the County of San Juan, State of New Mexico, seeking an adjudication of the reserved water rights held by the United States of America on its own behalf and on behalf of its Indian wards.[1] On April 14, 1975, the United

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[1] The pertinent portions of the Complaint filed by the State of New Mexico in Cause No. 75-184 are as follows:

> 6. That all known claims to the right to use waters of the said stream system in New Mexico were adjudicated in the Final Decree of the District Court in and for San Juan County, New Mexico in Cause No. 01690, the *Echo Ditch Company, et al. v. McDermott Ditch Company, et al.*, with the exception of the claims of the United States of America on its own behalf and on behalf of its wards, which claims have never been determined and decreed by any court.
>
> 7. That the United States of America is known to claim various and substantial rights to impound and/or divert and use public waters of the San Juan River Stream System on its own behalf and on behalf of its wards, to wit, the Jicarilla Apache Tribe of Indians, the Navajo Tribe of Indians and the Ute Mountain Tribe of Indians, under the Constitution and laws of the United States as well as under the Constitution and laws of the State of New Mexico.
>
> 8. That unless the claims of the United States of America on its own and on behalf of its wards to rights in and to the water of the San Juan River Stream System in New Mexico are determined and decreed as against the State of New Mexico and as against all other claimants of right to use the water of the said Stream System in New Mexico, the State Engineer will be unable to discharge his statutory duty to administer and supervise the waters of the San Juan River Stream System in New Mexico in accordance with law. . .

States filed its Petition for Removal of the State Court action to the United States District Court, District of New Mexico. The United States moved simultaneously for the dismissal of the Indian water rights adjudication on the grounds that the removal jurisdiction of the United States District Court was derivative from the San Juan County District Court and that the state court lacked jurisdiction to adjudicate the rights of the United States for its Indian wards. The State of New Mexico, among others, moved to remand.

An Order remanding the case to the New Mexico court was entered on October 23, 1975, by the United States court. The Court held that the New Mexico court was vested with jurisdiction over the water rights of the United States, as trustee for its Indian wards.[2] Later petitions to remove were denied on similar grounds. The Tribe was never named as a party or served with process.

On December 12, 1975, the Jicarilla Apache Tribe filed a Complaint invoking the jurisdiction of the United States District Court for New Mexico pursuant to 28 U.S.C. §1362, seeking a general adjudication of water rights on the Navajo River System[3] and its tributaries and seeking to

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[2] It should be noted that this Court's decision in *Colorado River Conservation District v. United States*, 424 U.S. 800 (1976), wherein the applicability of the waiver of sovereign immunity in the McCarran Amendment, Department of Justice Appropriation Act, 1953, §208(a)-(c), 43 U.S.C. §666, was extended to rights held on behalf of Indian tribes, was not issued until March 24, 1976, or some five months later.

[3] The Navajo River is a tributary of the San Juan River, arising in the State of Colorado, flowing into private lands in the State of New Mexico before it enters the northernmost portion of the Jicarilla Apache Reservation. The Navajo River

enjoin the Secretary of Interior from unlawfully diverting water from the Navajo and Little Navajo Rivers through the San Juan-Chama Transmountain Diversion Project to the Chama-Rio Grande River System in excess of amounts which can be beneficially used.[4]

Although the United States admitted the jurisdiction of the federal court, that Court, in response to a Suggestion of Want of Jurisdiction filed by the State of New Mexico, issued its Order in July, 1977, dismissing the action in favor of *New Mexico, ex rel. Reynolds v. United States of America, et al., supra,* then pending in state court. The federal District Court, in dismissing the action, held that the state court had exclusive jurisdiction to hear the matter.

The Court of Appeals for the 10th Circuit affirmed the judgment of the federal District Court dismissing that portion of the Tribe's action seeking an adjudication of its rights to the waters of the Navajo River and its tributaries, stating:

> We agree with the District Court's dismissal of this portion of the Complaint in light of the fact that an identical action has been previously filed in the state court and was pending when the Tribe's Complaint was filed in federal District Court. *Jicarilla Apache Tribe v. United States,* 601 F.2d at 1135.

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then flows back into Colorado before joining the San Juan River on the Southern Ute Reservation to form Navajo Lake which lies on the border of New Mexico and Colorado. The waters of the Navajo River provide the only perennial flow on the vast Jicarilla Reservation which contains in excess of 742,000 acres.

[4] San Juan-Chama Storage Project Act, 43 U.S.C. 615pp, *et seq.*, Pub.L. 87-483, 76 Stat. 97; Upper Colorado River Basin Compact, Act of April 6, 1949, Chapter 48, 63 Stat. 31.

Having found that the disclaimer provisions of the New Mexico Constitution[4] and Enabling Act[5] were not a bar to

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[4] The Preamble, §2 and §10 of Art. XXI, New Mexico Constitution, provides in pertinent part:

> **Preamble**
>
> In compliance with the requirements of the Act of Congress, entitled, "An act to enable the people of New Mexico to form a constitution and state government and be admitted into the union on an equal footing with the original states; and to enable the people of Arizona to form a constitution and state government and be admitted into the Union on an equal footing with the original states," approved June twentieth, nineteen hundred and ten, it is hereby provided: . . .
>
> Section 2.
>
> The people inhabiting this state do agree and do declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through the United States, or any prior sovereignty; and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the congress of the United States; . . .
>
> Section 10.
>
> This ordinance is irrevocable without the consent of the United States and the people of this state, and no change or abrogation of this ordinance, in whole or in part, shall be made by any constitutional amendment without the consent of congress.

[5] Section 2 of the New Mexico Enabling Act of June 20, 1910, 36 Stat. 557, 558-560, provides in pertinent part:

> And said [constitutional] convention, [for the Territory of New Mexico] shall provide, by an ordinance irrevocable without the consent of the United States and the people of said State — . . .

state court jurisdiction on the basis that such disclaimers waived only any proprietary interest the State may have had or claimed over Indian lands, the Court then based its decision affirming the District Court only on the fact that the State was first in time in filing its action for a general adjudication of water rights on the San Juan River.

This decision is directly contrary not only to the clear, unequivocal language of the disclaimer provisions of New Mexico's Enabling Act and Constitution, but also to this Court's decision in *Colorado River Conservation District v. United States, supra,* because the Court considered no other factor other than which party had prevailed in the race to the courthouse.[7] As stated above, the Complaint of

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> Second. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; . . .
>
> All of which ordinance described in this section shall, by proper reference, be made a part of any constitution that shall be formed hereunder, in such terms as shall positively preclude the making by any future constitutional amendment of any change or abrogation of the said ordinance in whole or in part without the consent of Congress.

[7] The decision of the Tenth Circuit Court of Appeals was filed March 12, 1979; almost three years after this Court's decision in *Colorado River Conservation District v. United States, supra.*

the State of New Mexico filed in state court, and upon which the decisions of both the United States District Court for the District of New Mexico and the 10th Circuit Court of Appeals were predicated, is clear that its intent is only to adjudicate the water rights of the United States held in its own behalf and on behalf of its Indian wards, all other rights having been previously adjudicated.[*] Issues purely federal in nature are thus relegated to state court jurisdiction for decision contrary to every rule of law promulgated by this Court.

The policy behind the McCarran Amendment, clearly indicated by its language, is to assure the quantification by adjudication of water rights claimed by the United States. It does not expressly or by implication grant or confer subject matter jurisdiction on the state courts to adjudicate Indian water rights. Persuasive arguments have been presented to this Court by the Respondents that federal issues must be heard by federal courts and, further, that matters relating to Indian property rights are not only matters for the federal courts to decide, but cannot be subjected to state court jurisdiction in those states whose enabling acts and constitutions prohibit the exercise of such jurisdiction.

Should this Court decline to recognize the disclaimer provisions as an absolute bar to state court jurisdiction, then we submit that the Court's language in the *Colorado River* case that federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them" should have guided the federal court in this case. 424 U.S. at 817. The United States in its Memorandum argues that if a Tribe or the United States timely invokes the jurisdiction of a federal court, then such court should be required

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[*] See, fn.1, *supra*.

to adjudicate the federally-reserved water rights. Timely invocation of federal court jurisdiction should not be defined, however, to mean that in all cases a federal court filing must precede a state court filing. Such a rule would result in the mischief obtained in the fact situation applicable to the Jicarilla Apache Tribe, Navajo Nation and Ute Mountain Ute Tribe in *New Mexico v. United States, supra,* where an earlier filing in a state court has resulted in exclusive state court jurisdiction, to adjudicate issues purely federal in nature.

CONCLUSION

The effort by the Tribe to invoke the jurisdiction of the United States District Court for New Mexico to determine its rights was rebuffed by the federal courts because of the prior filing of an action by the State of New Mexico. In so doing, the federal courts have overlooked the plain intent of the disclaimers of jurisdiction over Indian lands contained in New Mexico's Constitution and Enabling Act. Allowed to stand, the 10th Circuit Court of Appeals decision will result in manifest injustice to the Tribe in that its most precious resource will be determined by a state court in an action, piecemeal on its face, which requires only the interpretation and application of federal law.

The judgment of the 9th Circuit Court of Appeals should be affirmed.